Pennex Aluminum Corporation *and* Chauffeurs, Teamsters and Helpers, Local Union No. 430, a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 4–CA–13302

23 August 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 4 November 1983 Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The primary issue in this case is whether the Respondent could withdraw its open contract proposals before acceptance and resume bargaining in an attempt to capitalize on its perceived economic strength.

The facts, which are more fully stated in the judge's decision, reveal that the parties commenced bargaining for an initial contract on 23 April 1982.[1] Very early in their negotiations, the parties made concessions and reached tentative agreement in many key areas. After four negotiation sessions,[2] the Respondent submitted, on 15 June, a contract package to the Union for ratification. Two days later, the Union and its membership rejected the Respondent's contract package. No strike ensued, but rather the employees continued working.

After rejection, the Union's chief negotiator, Bruce Keener, contacted the Respondent's attorney and chief negotiator, Norman White. As reflected by the record, in the course of their conversations, Keener indicated four stumbling blocks to ratification in the areas of union security, wages, overtime pay, and sickness and accident benefits. By letter dated 7 July, the Respondent resubmitted its 15 June contract offer unchanged. No action on it was taken by the Union until 9 August. On that date, Keener asked White if the Respondent's last offer was still on the table. White said that it was. Keener then said that the offer would be put up for a ratification vote and if rejected a strike vote would be taken. At that time, Keener gave no indication one way or the other as to whether the Respondent's last offer would likely be accepted.

The next day, 10 August, White checked with his principal, President Harry Thompson, to verify whether the 15 June offer was still on the bargaining table. Contrary to the judge's findings, the record shows that according to Thompson's uncontroverted testimony he alone withdrew the 15 June offer and did so because it previously had been rejected. After receiving Thompson's position, White communicated the withdrawal to the Union. The evidence reveals that, with the exception of the probationary period length, the Respondent only withdrew those proposals on which no tentative agreement had been reached. The Union canceled the ratification meeting scheduled for 16 August.

Thereafter, the Union contacted the Respondent to resume bargaining. As agreed, the parties met on 10 September at which time the Union presented four counterproposals in the areas earlier identified to the Respondent as the stumbling blocks to ratification of an agreement between the parties.

At their next bargaining session, on 16 September, the Respondent proffered new proposals in the area of wages and union security as described in the judge's decision. Contrary to the judge's findings that the Respondent's offer at this time had "fewer benefits," it is impossible to ascertain from the state of the record whether the Respondent's 16 September proposal actually contained "fewer benefits" or was regressive bargaining. The Respondent also accepted the Union's proposal for an increase in sickness and accident benefits coverage. The parties further agreed to extend the length of the probationary period to comply with the time frame of the union-security provision. The parties later reached impasse, and the Respondent implemented its 16 September offer effective 14 October.[3]

The judge found a violation of Section 8(a)(5) in this proceeding in the Respondent's withdrawal on 10 August of its contract proposals. He found the withdrawal was solely because the employees had failed to strike following their initial rejection of the Respondent's offer in June. In finding a violation, however, the judge misconstrued the Respondent's testimony on its motivation for its 10 August withdrawal. President Thompson testified, without contradiction, that he alone made the decision to withdraw the 15 June offer because it pre-

[1] All dates hereinafter are in 1982 unless otherwise indicated.

[2] The judge incorrectly referred to the 1 June bargaining session as the "second" meeting when in actuality it was the third such meeting.

[3] The judge incorrectly referred to the implementation date as being "November 14" instead of the correct date of "October 14" which is in accord with the parties' hearing stipulation and the record.

viously had been rejected. There is no evidence that the withdrawal was made solely because no strike had ensued up to that time. The Respondent's attorney White's testimony indicates that the absence of a strike to date gave the Respondent reason to believe that the economic balance had swung in its favor. Moreover, the timing of the withdrawal was over 6 weeks after the employees had failed to strike, tending to show very little connection between the employees' choice not to strike and the Respondent's subsequent withdrawal on 10 August.

Further, even if such connection existed, in the context of the totality of the parties' bargaining, there is insufficient evidence to show bad-faith bargaining on the part of the Respondent. Before acceptance, one may withdraw or change its open proposals. *Shreveport Garment Mfg.*, 133 NLRB 117, 121 (1961); *Loggins Meat Co.*, 206 NLRB 303 (1973). When offers are withdrawn before acceptance the inquiry is concerning the good faith of the party withdrawing the offers. *Loggins Meat Co.*, supra.

In exploring the good faith of the Respondent, we find that the Respondent held the 15 June offer open for more than 6 weeks. The Respondent did not withdraw its entire package on 10 August. With but one exception, the Respondent withdrew only those proposals still not yet tentatively agreed to. In particular, by retracing the negotiations pertaining to the wages and the union-security proposals, it can be seen that many proposals from both sides were on the table on which no final agreement was reached. In addition, when the Respondent did introduce its 16 September offer, the proposals were not so harsh as to tend to prevent agreement. The evidence fails to exhibit any desire on the part of the Respondent to delay, evade, procrastinate, or postpone its bargaining obligation. The Respondent met regularly and frequently with the Union, made concessions early in the bargaining, and presented many proposals throughout in an attempt to reach agreement with the Union.

We are not faced with the situation of withdrawal in the face of actual or even imminent acceptance as found in *Mead Corp.*, 256 NLRB 686 (1981), enfd. 697 F.2d 1013 (11th Cir. 1983), relied on by the judge. Here all evidence at the Respondent's disposal on 10 August showed that the Union would likely reject the offer. In his conversation with White, Keener gave no indication that the Union would then endorse the Respondent's offer to its membership. In fact, Keener's last comments on the offer were those made shortly after the 17 June rejection, i.e., there were four problem areas preventing ratification. Thus, cases where actual or imminent acceptance was present are inapposite to the disposition of the issue herein. In sum, we shall dismiss the complaint.[4]

ORDER

The complaint is dismissed.

[4] Member Dennis finds that this case presents a close factual question concerning the Respondent's motivation in withdrawing its contract proposals. Based on her review of the record, Member Dennis concludes that counsel for the General Counsel failed to carry her burden of providing that the withdrawal was in bad faith or for the purpose of avoiding agreement.

DECISION

WILLIAM F. JACOBS, Administrative Law Judge. Original charges in Cases 4-CA-12773 and 4-CA-13302 were filed on March 24 and October 28, 1982,[1] respectively, by Chauffeurs, Teamsters and Helpers, Local Union No. 430 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union).[2] Case 4-CA-13302 was amended on November 22. Complaint in Case 4-CA-12773 issued on May 6 against Pennex Aluminum Corporation (Respondent),[3] alleging that it violated Section 8(a)(1) and (3) by threatening to close the plant if employees chose to be represented by the Union and by laying off employee Leonard Brown because of his support for the Union. On November 20 the two aforementioned cases were consolidated. The consolidated complaint alleges that Respondent also violated Section 8(a)(1) and (5) by bargaining in bad faith with no intention of reaching a final and binding agreement with the Union by modifying its union-shop proposals and modifying its wage proposals. In its answer Respondent denies the commission of any unfair labor practices.

At the hearing,[4] which was held before me on May 9 in Harrisburg, Pennsylvania, the 8(a)(3) allegation was withdrawn and made the subject of a non-Board settlement. The 8(a)(1) allegation concerning the threat to close the plant became the subject of an informal settlement agreement which I approved at the hearing. There remains for consideration and decision, therefore, only the 8(a)(1) and (5) allegation.

FINDINGS OF FACT

Toward the end of 1981 and in the early months of 1982 the Union undertook an organizing campaign among Respondent's employees working at its aluminum extrusion plant in Wellsville. Respondent undertook an antiunion campaign at the time which included threats of plant closure and of stalling during negotiations but the ultimate result of the campaign was certification of the Union on March 1.

[1] All dates are in 1982 unless otherwise indicated.
[2] The status of the Union as a labor organization is not in issue.
[3] Jurisdiction is not in issue.
[4] The General Counsel's unopposed motion to correct the transcript is granted.

Following certification, negotiating sessions were held on six occasions beginning April 23. At these meetings the Union was represented by Bruce Keener, business agent, and James Wardrop, an employee of Respondent, while Respondent was represented by its attorney, Norman White, and its president, Harry Thompson.

At the first meeting on April 23, the Union submitted its initial proposal. No counterproposal was made by Respondent at this time but wages and union security appear to have been discussed at length.

At the second meeting, on June 1, Respondent offered the possibility of granting union security with an April 23 effective date in return for the Union's agreeing to Respondent's discretionary right to grant merit or incentive raises up to $1 per hour. Wage increases being considered at this time were 15 cents across the board immediately and a 5 cents additional wage increase in 6 months.

At the June 9 meeting new proposals were exchanged and the Union voiced its antipathy toward the inclusion of any sort of discretionary merit or incentive wage increases in the contract. The Union submitted a proposal for an immediate 35-cent-per-hour wage increase with an additional 15-cent-per-hour wage increase in 6 months but later lowered its demands to a 25-cent-per-hour wage increase immediately and an additional 15-cent-per-hour wage increase in 6 months. Respondent lowered its proposal for a discretionary merit increase from $1 to 50 cents. The Union rejected Respondent's proposal. Respondent then proposed an immediate 25-cent-per-hour across-the-board increase with an additional 40 cents in incentives at Respondent's sole discretion or in the alternative a 20-cent-per-hour wage increase without incentives. The Union did not agree to either of Respondent's alternative proposals but did agree to place them before the membership without a recommendation. A number of issues still remained to be resolved at the end of the June 9 negotiating session.

On June 15 White sent a proposed contract to the Union with a cover letter explaining that Respondent had not yet reviewed it and it might require some minor revisions.

The membership voted on June 17 on the alternative plans and rejected both. Keener advised White of the results. On July 7 White informed Keener that its last offer was its best offer and that Respondent had gone as far as it could go and that the ball was in the Union's court.

Between July 7 and August 9 there was no communication between the parties. On the latter date Keener called White and asked if the offer previously made and voted on by the employees was still on the table, because if it was, and was a final offer, Keener wished to take another vote on Respondent's proposal and, if it were rejected, then take a strike vote. Faced with this question, White answered that the proposal was still on the table. Keener advised White that he had already prepared notices to the membership informing the members of a forthcoming meeting at which a vote would be taken on the final offer. White replied that the offer was still on the table. Relying on White's assurances, Keener had the notices, already prepared and dated August 6, mailed out.

On August 10, after consulting with his client, White withdrew the offer solely on the basis that it had initially been made at a time when Respondent feared a strike and now that it knew that there was no strike threat hanging over its head, it could afford to take a tougher position. When the offer was withdrawn, no vote was taken. On September 16 Respondent offered a new proposal containing fewer benefits than were contained in its earlier proposed agreement. Thus Respondent decreased its across-the-board wage proposal from 25 cents per hour to 20 cents per hour and increased its merit increase proposal from a maximum of 40 cents to a maximum of 75 cents. It also proposed that the effective date of union security be the contract ratification date rather than February 19, 1982, which had been proposed earlier. Respondent's position with regard to insisting on the discretionary merit increase was based admittedly on its desire to maintain control over its employees by keeping a "free hand" with regard to wages. It is quite apparent that its position with regard to union security was to set the effective date later, rather than earlier, at a time when it felt the Union was weaker with regard to employee loyalty.

Faced with this situation the Union proffered a new set of proposals which were rejected by Respondent. Respondent then on November 14 unilaterally implemented its last "final" proposal, i.e., the lesser offer which had been triggered by the Union's failure to strike.

Analysis

The underlying purpose and philosophy of the National Labor Relations Act is the maintenance of labor peace through the process of collective bargaining in good faith. In the instant case Respondent bargained with the Union in good faith and proffered for the Union's consideration and possible ratification a collective-bargaining agreement which it considered economically acceptable. The employees initially rejected Respondent's proposed agreement but, later, through its bargaining representative, asked if the proposal was still on the table, whereupon Respondent's bargaining representative gave assurances that the agreement was, in fact, still on the table and subject to a second ratification vote. Subsequently, after Respondent's bargaining representative spoke to management, he announced that the proposed agreement had been withdrawn, and admitted at the hearing that the reason was solely that *the employees failed to strike.*[5]

I find that Respondent, by withdrawing its proposed agreement on August 10, immediately after reoffering it on August 9 and before the employees had a chance to vote on ratification, *solely because they had failed to strike* following their initial vote, is a tactic which is inconsistent with the purposes of the Act because far from assuring labor peace it puts a premium on labor unrest. Thus, if I, the Board, then the courts were to find that the bargaining tactics here used by Respondent were lawful, then every union engaged in collective bargaining would thereby be placed on notice that unless it struck or immediately accepted the employer's initial proposal, any

[5] See R. Br. 19-20, 23; Tr. 129-130.

such proposal placed on the table by an employer would be withdrawn and a lesser offer subsequently proposed.[6] The threat of economic reprisals for failure to strike would have the effect of inducing a strike. The use of such a tactic inherently evidences a lack of intention to reach agreement.

Moreover, in the instant case, if it were determined that Respondent could lawfully withdraw its June contract proposal *solely because the employees failed to strike*, and subsequently offer a lesser proposal in September, why could it not thereafter lawfully and logically withdraw its September offer if the employees once again failed to strike, and subsequently offer a third proposal containing still fewer benefits. The tactic could theoretically be used ad infinitum or until the strike was forced.

In short, I find that by withdrawing its original contract proposal before a scheduled second ratification vote *solely because the employees failed to strike* at the time of, or following, their initial rejection of the original proposal, Respondent failed to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act.[7]

THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth above, occurring in connection with its operation described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take appropriate and affirmative action designed to effectuate the policies of the Act. In particular, as I have found that Respondent unlawfully withdrew its original contract proposal before a second scheduled ratification vote solely because the employees failed to strike at the time of or following their initial rejection of the original proposal, I shall recommend that Respondent be required to reinstate the unlawfully withdrawn proposal for a period of 20 consecutive days from the date that it is formally offered to the Union.[8]

CONCLUSIONS OF LAW

1. Pennex Aluminum Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Chauffeurs, Teamsters and Helpers, Local Union No. 430 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. On March 1, 1982, the Union was certified as the exclusive collective-bargaining representative of the employees in the following unit:

> All production and maintenance employees, including laborers, truckdrivers and shipping and receiving employees employed by Respondent at its Wellsville, Pennsylvania location, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. By refusing to bargain in good faith with the Union as the exclusive bargaining representative of the employees in the above-described unit, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The above-described unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

[6] This is not to say that prior to ratification, for *legitimate economic reasons*, a proposal by an employer could not be withdrawn and a new proposal with downward revisions proffered in its stead. Cases are numerous on this point. In this case, however, no such legitimate economic reasons were offered by Respondent for the action taken.

[7] Cf. *Mead Corp.*, 256 NLRB 686 (1981), affd. 697 F.2d 1013 (11th Cir. 1983).

[8] *Mead Corp.*, supra.